JAN 1981

CASE NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner,

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

Petitioner is satisfied with its Statement of the Case contained in its Brief on the Merits, 2-8.

ARGUMENT

I. Chrysler's Rebate Programs Caused Price Discrimination Against Payne.

The jury found the retail[1] price rebates discriminated against Payne in price on certain model cars, were unfair and not equally available because of the higher purchase and sales

[1]Fleet rebate programs were not an issue at the trial, nor are they relevant here.

quotas Chrysler assigned Payne before it could receive a rebate. Because the Fifth Circuit did not reject the jury's holding on this issue, the rules of the rebate programs and their inequities have not been covered in detail by Petitioner in its Brief.[2]

Chrysler seeks to mask the effect of the per car price discrimination in each program's duration by averaging *all* rebates over a three and one-half year period (Res. Br. 12). The discrimination resulting from the rebates, however, cannot be properly examined by looking at the *total* amount of rebates paid over the three and one-half year period because that overlooks the price discrimination against Payne on each individual car during each individual program's two or three month's duration.[3] If the rebates had truly been equally available to

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[2]Pl. Ex. 1-16 are the rebate programs causing the price discrimination. Each dealer would be paid a rebate only if that dealer satisfied its quota of selling cars at retail (or its quota of purchasing at wholesale from Chrysler). For example, in "Winter Winners" (Pl. Ex. 1; Tr. 140-144). Payne was assigned a purchase objective quota of 99 new cars, with the next highest quota being assigned to Central for 63 cars. In that program's duration of three months, Chrysler rebated up to $135.00 per car depending upon the various levels of qualification by the various dealers after meeting their quotas. Had Payne been able to receive rebates the same as the other dealers, it would have received approximately $8,235.00 on the new cars it purchased from Chrysler. In that program, Payne received no rebates whatsoever, Central received $5,310, Roebuck received $8,310, and Vestavia (Hall) received $3,015 (Pl. Ex. 1; Tr. 140-144). Payments are shown on Pl. Ex. 37, 38; App. 228-229.

[3]Chrysler divided the total number of cars sold by each dealer by the total amount of rebates received and then determined an average rebate difference (Res. Br. 12) over three and one-half years. This ignores the price disadvantage to Payne on each particular model or "car line" during each program when the dealers were competing for the resale of those cars. Approximately every 90 days the dealers sold all their new cars (Tr. 60-61; 83) and hence got the rebates. Price discrimination under the Robinson-Patman Act is determined by comparing Chrysler's prices for the same model car (like grade and quality) to all dealers during a contemporaneous time period, as opposed to an average price over years.

Of Payne's approximately $99,000 in total rebates over the 3½ year period (Def. Ex. 28; App. 267), 72% was received on cars where the programs were not discriminatory and on which Payne claimed no damages (Tr. 687-688).

Payne, as they were to the favored dealers, then the volume of the dealership would be irrelevant. Both large volume dealers and low volume dealers would each receive approximately the same rebate on each car sold.

II. A Jury Is Entitled To Infer Injury From Price Discrimination Coupled With Other Corroborating Evidence.

A. *The Fifth Circuit Wrongfully Precludes Inferential Proof of Damage and Requires Proof Of Specific Lost Sales and Profits.*

The Fifth Circuit's opinion rejects proof of antitrust injury through inferential or circumstantial evidence and holds that a plaintiff can only recover damages if he can directly prove a loss of sales or profits.[4] It misconstrues Payne's position by saying that Payne contends that mere price discrimination is insufficient to prove injury. (607 F.2d at 1136; App. 6). Its opinion ignores the well established rule in *Perkins v. Standard Oil Co. of California,* 395 U.S. 642, 628 (1969), that inference of antitrust injury is permitted, and that the ultimate conclusion of what the evidence proved should be left to the jury.

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[4]Despite Chrysler's position to the contrary, the Fifth Circuit's opinion plainly held that antitrust injury could only be proved by directly proving lost sales and lost profits, and not from other inferential proof or circumstantial evidence:

> Competition is harmed *only* to the extent that the favored purchaser, by the use of the discriminatory price difference, actually *draws sales or profits* from his unfavored competitor . . . .
>
> * * *
>
> A price difference without more does not indicate the amount of lost sales or profits.

607 F.2d at 1136-37 (emphasis added).

Chrysler attempts to disassociate itself from the ruling of the Fifth Circuit and tacitly admits (Res. Br. 2) that the Fifth Circuit's opinion is too burdensome. Cessa Aircraft Company (Amicus Brief, pg. 4) states that the Fifth Circuit "squarely rejected" the proposition that antitrust injury may be inferred. Yet Chrysler, in its brief at page 2 and page 40, n. 30, admits that antitrust injury may be inferred from circumstantial evidence, citing *Bargain Carwash, Inc. vs. Standard Oil Co.,* 466 F.2d 1163 (7th Cir. 1972).

Contrary to Chrysler's statements (*See*, e.g., Res. Br. 13), Payne does not contend that, in a total vacuum absent other corroborative proof, mere price discrimination automatically indicates damage to the disadvantaged purchaser.[5] By seeking the elimination of the "general damage," or "minimum damage" rule,[6] Chrysler is necessarily asking this Court to overrule *Perkins* which permits a jury to infer actual antitrust injury from the evidence in the case.

Payne is not requesting this Court to announce a *per se* damage rule in Robinson-Patman Act cases. Chrysler tries to obscure the fact that the Fifth Circuit erroneously required Payne to assume the unwarranted burden of proving specific lost sales and profits, rather than permitting inferential proof of injury, which normally occurs in the market place where its supplier's costs are higher than its competitors. In *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757 (1947), this Court implicitly recognized that a defendant would have an opportunity for rebutting the normal occurrence of injury in the amount of price discrimination if "extraordinary circumstances" do arise. The Fifth Circuit's decision ignores this fact, and hence requires a far too heavy burden on the plaintiff.

Relying principally on *Enterprise Industries, Inc. v. Texas Companies,* 240 F.2d 457 (2d Cir.), *cert denied* 353 U.S. 965 (1957), and other decisions following that case, the Fifth Circuit has misinterpreted the principles governing proof of damage. *Enterprise,* relying on *Interstate Commerce Commission v. United States,* 289 U.S. 385, 391 (1933), does permit inferential proof of damages *without* proof of specific loss of sales or profit. *Enterprise* left room for an inference of damage when the price discrimination is supplemented by other cor-

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[5]*See,* argument at Pet. Br. 9, 13, 24, and 25, where other evidence supporting the price discrimination is required.

[6]The rule sought by Payne is more appropriately known as the "minimum damage rule" because the price differential, in the absence of proof of lost sales and profits or other consequential damage, is the "minimum damage" to which an injured party is entitled.

roborating evidence.[7] As shown in the following sections, there was a vast amount of corroborating evidence showing damage to Payne.

B. *Inference of Injury Is Proper Since There Was Keen Competition In The Market, Relatively Small Profit Margins, Sustained, Substantial Price Discriminations Which Influenced Retail Prices, Lost Sales, and A Decline In Payne's Profits.*

Keen Competition

Unrefuted testimony showed that the price discrimination, in a market of keen competition, caused Payne to lose sales and was a cause of Payne's being forced out of business.[8] Even if by itself this evidence does not show antitrust injury, it is nevertheless good and useful evidence which, at the very least, permits an inference of damage.

Chrysler's review of the dealers' average gross profits (Res. Br. 10-11) does not refute testimony that Payne lost sales to other dealers, forced business, over-allowed on trade-ins, and that competition was keen. First, the figures contain no breakdown of the gross margin per car for those cars on which Chrysler paid a rebate at the time of the price discrimination. Thus, there is no examination of competition on those cars at that particular time. Secondly, the figures do not contain a major element of the profits of each dealer on the sale of a new car — profits on resale of the used car trade-ins. After the used cars

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[7]240 F.2d at 459-460, where the Second Circuit recognized that damage is "a necessary inference" of discrimination when there is "more" evidence than mere price discrimination.

[8]Payne's new car customers compared Payne's prices with the other three competing dealers (TR. 45-46; App. 18-19). Payne's customers regularly informed Payne during the rebate programs that they were not buying at Payne because they could buy the same cars at lower prices at the other three competing Chrysler dealers (TR. 126-127; App. 95). The price discrimination was one of the causes of Payne's ceasing business, (TR. 69, 100, 705-706; App. 39, 65, 222-223). Chrysler attempts to discount this evidence by saying it is uncorroborated (Res. Br. 7). This evidence supports an inference of damage.

gross profit figures are added to this analysis, it is clear that Payne always received the least gross profits.[9]

Lost Sales

Payne also showed that it lost a substantial amount of business in the retail sales market from the rebate discrimination. (Tr. 55, 76-70, 91-95, 97-100, 126-127; App. 29-30; 34-40; 50-57; 60-64; 92-95). In 1972, its share of the retail market decreased from 27% to 23%. In 1973, after Chrysler discontinued those rebate programs which based the rebates on the dealer's alleged "fair share" of the market, Payne's share of the market increased only 2%.[10] The rebate programs continued to discriminate against Payne, even after its "fair share" programs were eliminated, because the quotas assigned by Chrysler to Payne were too high since Vestavia was now in the same trading zone as Payne and Payne could not sell enough cars to meet its quota and receive a rebate.

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[9]Payne's used car department, according to the unrefuted testimony, was the area where Payne's business suffered most because of over-allowing to obtain new car sales. When the dealer profit comparisons for those years are examined using the average gross profits of *both* the used and new cars (from Def. Ex. 31; App. 268-269), the results show that Payne was lowest in profit margin because of the price discrimination:

Average Gross Profit (New and Used Cars)

	J. Truett Payne Co.	Hall Motor	Roebuck	Central
1971	494	676	567	499
1972	548	590	588	537
1973	543	592	625	645

Since Payne had the lowest profit margin because of price discrimination, it is clear that it could not pass on its higher costs for the cars to its customers. In such a case, the amount of the price discrimination is the amount of the damage. *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wis. 1979).

[10]Def. Ex. 31; App. 268. Payne's "fair share" of the market was unilaterally determined by Chrysler to be 40.19% until 1973, when it was revised to 25.99%. Many rebate programs used until 1973 based the quotas assigned to Payne on that "fair share". The other dealers' "fair share" in 1972 were as follows: Central – 25.77%; Roebuck – 21.05%; Vestavia – 12.99%, (Pl. Ex. 36; Tr. 59). During this period from 1970 through 1973, Chrysler was enjoying a period of prosperity, contrary to the problems it is having today.

Tight Profit Margin and Substantial Price Discrimination

The amount of the rebated price discriminations was substantial, totalling $81,248, and ranging up to several hundred dollars per car in some of the various programs (e.g. Pl. Ex. 48, 52, 53; App. 239, 243, 244). The net profits of the dealer on the sale of new cars was usually less than the amount of the rebate,[11] certainly indicating the fact of tight profit margin. With rebates being in many instances 50% or more of the average gross profit (*See* Def. Ex. 31; App. 268) and as much or more than the *net* profits, the jury could properly infer that the substantial amount of the price discrimination affected the retail sales price.

F.T.C. v. Morton Salt Co., 334 U.S. 37, 50-51 (1948), established the rule that price discrimination, substantial enough to affect retail prices, is sufficient to support inference of injury. Unrefuted testimony shows that the rebates did in fact influence the retail sales price between the competing dealers in the Birmingham area.[12] Therefore, under *Morton Salt* there is sufficient evidence to support the inference of damage to Payne.

In *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972), the Seventh Circuit held that a jury could properly infer injury under Section 4 of the Clayton Act in the following situations:

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[11]In 1971 the net profits per new car varied from $−32.59 to $130.80 per new car; in 1972, from $26.50 to $197.76 per new car; in 1973, from $35.00 per car to $72.53 per car. Following Chrysler's logic on page 10-11 of its brief, these figures certainly show keen competition in the market.

[12]*See*, Mr. Payne's testimony (Tr. 62, 67, 124-125; App. 32-33, 36-37, 92-93). Dr. Ignatin also testified that the retail prices were affected by the discrimination so significantly that they were higher for the consumer than they otherwise would have been absent that discrimination (Tr. 203-204; 255-256; App. 134-135; 101-103). At one point Mr. Payne stated that he did not think the rebates affected the retail sales price of the automobiles (Tr. 85). However, both prior to and after that testimony, Mr. Payne stated that because the other dealers were receiving the cars at a lower price from Chrysler, and because he knew his customers were buying the same cars from the competing dealers at a lower price than Payne could sell them, the price rebates discrimination did reduce the retail sales price.

[1] . . . a price differential that influences prices . . . (*Morton Salt Company*) . . .

[2] . . . a price differential that exists in the context of keen competition and tight profit margins (*E. Edelmann Company*[13] . . .) . . .

[3] or a substantial and sustained price differential between competing resellers (*National Dairy Products Corp.*[14]).

The instant case has evidence supporting all three alternatives above in addition to the direct testimony that price discrimination caused a loss of Payne's sales and caused Payne to go out of business (Tr. 69, 100, 706; App. 39, 65, 222-223).

Decline in Profits

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-124 (1969), this Court held that proof of "decline in . . . profits" during the period of price discrimination would be sufficient evidence by which a jury could infer injury under Section 4 of the Clayton Act. During the years 1970 through 1973, the period at issue in this case, Payne suffered losses in each year.[15]

Under this Court's decision in *Perkins v. Standard Oil of California*, 395 U.S. 642, 648 (1969), Payne introduced sufficient supporting evidence to permit the jury's finding (inference) of damage. Substantial evidence in the instant case showed (1) substantial price discrimination, (2) in a keenly competitive market, (3) with tight profit margins, (4) which affected retail sales prices, (5) was a cause of Payne's business failing, and (6) caused the profits of Payne to decline during the time of the price discrimination. Thus, the amount of the price discrimination in this case is the best approximate amount of damage. That amount of damage need not be exact.[16]

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[13]*E. Edelmann Co. v. F.T.C.*, 239 F.2d 152 (7th Cir. 1956).

[14]*Nat'l Dairy Prod. Corp. v. F.T.C.*, 395 F.2d 517 (7th Cir. 1968), *cert. den.*, 393 U.S. 977.

[15]*See*, Pl. Ex. 32-35; 61; Tr. 71; 288-289. Payne had a profit in 1967 and 1968, and a slight loss in 1969.

[16]*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1968); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946). In *Zenith Radio*,

III. The Minimum Damage Rule Is Not Precluded By The Legislative History Of The Robinson-Patman Act.

In the original Senate provision of the Robinson-Patman Act, there was proposed a damage clause which would provide that the measure of damages, in the absence of proof of greater damage, would be presumed to be the amount of the prohibited discrimination.[17] Because this presumption of damages was omitted from the final Act as passed by both Houses of Congress, Chrysler contends that this omission declared Congress' intent that the minimum damage rule should never be permitted in awarding damages.

Chrysler's argument is specious because it utilizes a "negative" inference from legislative history which is far from clear. Chrysler claims Mr. H. B. Teegarden so desired that damage provision in the Act that his views on its interpretation and use should be attributed to Congress. Mr. Teegarden was general counsel for a special interest group, the Wholesale Grocer's Association, and explained to Congress what he thought of the proposed bill and its damage provisions. Merely because Mr. Teegarden thought the presumptive damage provision necessary does not mean that Congress (either the House, the Senate, or the House and Senate conferees) believed that under § 4 of the Clayton Act the amount of the price discrimination could not be awarded without a new provision on damages being placed in the Act.

The proposed damage section was eliminated by the conference committee which utilized the House Judiciary Committee's version of the Bill, a very different version from the Sen-

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this Court held that the measure of proof needed to fix the amount of damages was much less than that required to show that there was, in fact, some damage sustained by the plaintiff.

[17]Subsection 2 (d) of the Senate's version of the proposed Act contained this presumption of damage clause. S. 3154, 74th Cong. 2d Sess. (1936). The Bill reported by the House Judiciary Committee did *not* contain a damage clause (H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. 1-20 (1936)), and there is no reason given, if indeed there was one, for its omission.

ate version. There was absolutely no reason given why the Senate conferees agreed to "recede" and eliminate that proposed subdivision on damages.[18] During Mr. Teegarden's and Senator Robinson's brief statements on the proposed damage section, none of the House or Senate members ever gave their own views or agreed or disagreed on that provision.[19] Nor did the Conference Report comment on whether the amount of the price discrimination could or could not be the minimum amount of damage under § 4 of the Clayton Act.[20]

Congressman Wright Patman, who was the sponsor of the Act and the most intimately familiar with it, has attributed the deletion of the Senate's damage provision to merely legislative bargaining.[21] The omission of the proposed language on damages in the final version of the Act cannot rationally be taken to mean that Congress has rejected the minimum damage rule concept. There are many reasons why it could have been eliminated other than the fact that Congress did not desire a court to utilize its inherent powers to determine the best legal method of proving injury.[22] This Court has recognized that

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[18]H. R. Conf. Rep. No. 2951, 74th Cong. 2d Sess. 8 (1936).

[19]*See, Hearing on H.R. 8442, et al., before the Comm. of the Judiciary, House of Representatives,* 74th Cong., 1st Sess., Ser. 10, pt 1, 219-221 (1935). The statements of Senator Robinson cited by Chrysler (Res. Br. 23-24, n. 21) are taken out of context. The Senate was not even discussing the proposed damage provision, but Senator Robinson alluded to the section in commenting on the need for a penal provision for fine or imprisonment. 80 Cong. Rec. 6348-49 (1936).

[20]*See,* H.R. Conf. Rep. No. 2951, *supra.*

[21]Patman, *The Robinson-Patman Act* 325 (1938). An examination of the House Conference Report No. 2951 (*see* immediately preceding footnote) shows that there was an immense amount of legislative bargaining and comprise. The House Bill and the Senate Bill were very different before they went to the Conference Committee. Many of the similarities of the two bills had disappeared once they had been reported out of their respective House and Senate Judiciary Committees. Therefore, legislative bargaining was a necessity in order to get the Act passed.

[22]For example, the Conferees could have deleted that provision because of their belief that it was a fairly mild provision and that under the Clayton Act a court could already apply the minimum damage rule and also award consequential damages where appropriate. Or, in order to avoid a prolonged fight by a minority of House Members, the Senate could have agreed to the deletion of that damage language despite the

courts do not need specific Congressional authorization to permit proof of damages in the minimum amount of the discrimination.[23] To require specific authorization would be tantamount to turning over to Congress the judge's function of ruling on the admissibility of evidence. Chrysler's rationale that the deletion of the provision on damages from the Robinson-Patman Act indicates Congressional intent to prohibit a court's use of the minimum damage rule is pure speculation.

The proposed damage provision was considered by the Conferees as a "new" measure of damages only because it was contained in the proposed Robinson-Patman Act and worded differently from Section 4 of the Clayton Act. The proposed damage provision was originally "automatic" in the sense that proof of injury was not necessary. To remedy that problem, the proposed bill was amended to add the language "where the fact of damage is shown."[24] However, that language did not cure the obvious situation where there may have been some damage, but it would have not been the total amount of the price discrimination. In that case, the proposed damage provision would still require the amount of the price discrimination to control. Under the Clayton Act and the minimum damage rule, the courts and juries had, and still have, flexibility to permit the amount of damages in the amount of price discrimination, or greater or lesser sums, depending upon the situation.

An examination of the legislative history shows it is, at best, very confusing. Chrysler cites as support Mr. Teegarden's amendment to the proposed damage clause, where he added the words "where the fact of damage is shown" (Res. Br. 20, n. 17). The House Judiciary Committee eliminated that entire clause without any comment whatsoever, even though

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fact that the intent of a minority of both Houses of Congress would have been to permit the minimum damage rule. Or, the conferees might have had no real reason other than feeling it was superfluous.

[23]*See, Bruce's Juices v. American Can Co.*, 330 U.S. 743, 751 (1947); *See also, Ben B. Schwartz & Sons, Inc. v. Sunkist Growers, Inc.*, 203 F.Supp. 92, 100 (E.D. Mich. 1962).

[24]*See*, Res. Br. 19-20, n. 17.

that subsection required proof of actual damage. Following Chrysler's logic, because the Committee eliminated that Subsection (d) on damages, which contained language requiring proof of actual antitrust injury, one might argue that, therefore, the House rejected the requirement that a Robinson-Patman Act plaintiff must prove the fact of injury, but would permit the injury to be shown by the mere fact of a price discrimination. Use of "negative" legislative history is ill-advised.

In view of Mr. Patman's intimate knowledge of why Congress eliminated the damage clause, and in view of the purpose of the Act to "restore, so far as possible, equality of opportunity in business by strengthening antitrust laws . . . against . . . unlawful . . . price discrimination . . .",[25] the reaffirmance of the minimum damage rule harmonizes with the policy and purpose of the Act.

IV. Courts Have Inherent Authority To Determine The Best Method To Be Used In Proving Damage.

The application of the minimum damage rule is a judicial determination of the best evidence by which the plaintiff can prove a Congressionally mandated remedy. The issue here is th *evidentiary means* of accomplishing the remedy already provided by Congress. Courts have inherent authority to determine the best and "legal" evidence of proving what is, or is not, prohibited by statute. The use of the minimum damage rule would not "open the floodgates" of litigation as Chrysler would have this Court believe. Injury under § 4 of the Clayton Act still must be proved, and unless the injury is supported by the price discrimination and other corroborating evidence, a plaintiff would be foolish to get into a complex antitrust lawsuit.

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974), cited by Chrysler (Res. Br. 26), is distinguishable from the instant situation for two important reasons. First, the Court

[25]H.R. Rep. No. 2287, 74th Cong. 2d Sess. 3 (1936).

there was faced with construing the Robinson-Patman Act so as to extend federal jurisdiction into an area of previous state control. To rule with the plaintiff's contentions in *Copp Paving,* this Court would have had to overrule *all* the Courts' of Appeals previous interpretations of the Act limiting its coverage to those transactions actually occurring in interstate commerce. Secondly, in our case, the Congressional purpose mandated in the Act will be better effectuated by the Court's reaffirming the minimum damage rule rather than by the Court's restriction of damages only to the amount of lost sales and profits.[26]

V. Case Law Prior To Passage Of Robinson-Patman Act Permitted The Minimum Damage Rule.

At the time of the passage of the Robinson-Patman Act in 1936, existing law permitted the assessment of minimum damages in the amount of the price discrimination. In *American Can Co. v. Ladoga Canning Co.,* 44 F.2d 763 (7th Cir. 1930), the Court discussed the element of damages that could be assessed in a price discrimination case under the Clayton Act prior to its amendment by Robinson-Patman Act. In that case, the plaintiff had tried to prove lost sales, but could not precisely do so. Defendant argued that the evidence failed to show that the plaintiff suffered any damage by virtue of the price discrimination, and that the proper rule of damages would not permit damage in the amount of the price discrimination. Nevertheless, the Seventh Circuit held that the jury may award damages in the amount of the price discrimination. *Id.* at 769.

The *Ladoga* Court discussed the plaintiff's difficulty in proving damages and the necessity of using circumstantial evidence supplemented by inferences deduced from the evidence. Because the defendant's wrong caused plaintiff difficulty in proving damages, the Court held the defendant cannot take refuge behind the alleged uncertainty or indefiniteness of plaintiff's

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[26]*See,* Pet. Br. 17-21, concerning the policy and purpose of the Act.

proof, and held that damages could be awarded in the amount of the price discrimination. Thus, *Ladoga* supports the fact that under Section 4 of the Clayton Act,[27] courts in price discrimination cases have long permitted the minimum damage rule.

VI. The Minimum Damage Rule Better Effectuates The Purpose Of The Act And Is Supported By The Sherman Act Cases.

A cardinal rule in the antitrust law is that damages cannot be denied an injured party simply because that party cannot calculate them with absolute certainty. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). This Court has continued to be flexible in permitting proof of the approximate amount of damages once an inference of causal connection of the damage has been shown. *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[28] (sufficient evidence present from which a jury can *infer* the necessary causal connection between violation and injury); *Bigelow v. RKO Radio Pictures Inc.*,[29] (once a violation proved which has a *tendency* to injure plaintiff, there is a reasonable inference that such an act did cause damage to plaintiff); *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[30] (permits a just and reasonable inference of damage from a *tendency* of the defendant's acts to injure the plaintiff). Because of the difficulty of proving damages in private Robinson-Patman actions,[31] the minimum damage rule

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[27]The district judge, in *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, 990, n. 9, *aff'd* 87 F.2d 919 (5th Cir.), *mod. on other grounds and reh. den.* 190 F.2d 63 (5th Cir.), *cert. dismissed* 342 U.S. 875, also recognized that the minimum damage rule ("general damage" rule) was permitted under § 4 of the Clayton Act long before the Robinson-Patman Act was passed.

[28]370 U.S. 690, 700 (1962).

[29]327 U.S. 251, 264-265 (1946).

[30]395 U.S. 100, 123-125 (1969).

[31]*See*, Pet. Br. 20, setting out the number of cases plaintiffs have won in private actions from 1936-1961. Also, Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & Econ. 365, 383 (1970), wherein the number

would enhance the policy of providing an adequate remedy when the plaintiff has been damaged but could not otherwise specifically prove lost sales and profits or other consequential damages.

It would be almost impossible to precisely measure the competition and the effect of the discrimination on Payne because of the multitude of factors.[32] Even if such an analysis were made, it would be speculative at best. This Court's flexible rule permitting inference of injury harmonizes with Congressional policy and this Court's policy of encouraging private attorneys general to enforce the Robinson-Patman Act. Since the Robinson-Patman Act was passed in order to strengthen the Clayton Act as it applies to individual competitive situations,[33] fulfillment of that purpose militates in favor of reaffirming the minimum damage rule.

Respondent's claim that the cases of *Illinois Brick* and *Hanover Shoe* are not applicable to the Robinson-Patman Act (Res. Br. 37-38) is incorrect. Those cases hold that the illegal cost difference is *prima facie* proof of damage and emphasize the policy which permits easier, less costly and less complicated antitrust enforcement. If the disadvantaged purchaser passes on the higher price, that does not bar his recovery under the Robinson-Patman Act, just as a "pass-on" defense is not a bar

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of Robinson-Patman Act private cases which have been tried and won by the plaintiff are listed for several years:

1964	170 Tried;	8 Won
1965	90 Tried;	16 Won
1966	107 Tried;	17 Won
1967	79 Tried;	13 Won
1968	79 Tried;	11 Won

[32]Such as the various types and amounts of dealers costs, used car trade-in values, supply and demand, subjective customer preferences, total retail sales price, and dealer location. This is exactly the type of analysis that this Court rejected in the cases of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), because of its inaccuracy, excessive expense, difficulty, and time consuming nature.

[33]Sen. Rep. No. 1502, 74th Cong. 2d Sess. (1936); H. R. Rep. No. 2287, 74th Cong. 2d Sess. (1936); *E. Edelman & Co. v. F.T.C.*, 239 F.2d 152, 155 (7th Cir.), *cert. denied*, 355 U.S. 941 (1958).

under the Sherman Act. The disadvantaged purchaser passing on the higher price will still lose volume in its sales, be less able to compete, or offer less services. Plaintiff is damaged in fact by this higher cost because it lessens its opportunities to maximize profits.

Perkins v. Standard Oil Co., 395 U.S. 642 (1969), also supports Payne. In *Perkins,* the price discrimination occurred when defendant sold to its first level subsidiary at prices lower than defendant sold to plaintiff. The first level subsidiary passed the price advantage on to another subsidiary at plaintiff's level of competition, which could then undersell plaintiff. The Court gave effect to the alter-ego theory so that the wrongdoer could not escape liability by merely setting up a series of controlled corporations, the last of which sold below plaintiff's prices at plaintiff's level of competition. Therefore, *Perkins* is not contrary to *Hanover Shoe* and did not validate a "pass-on" defense in a Robinson-Patman Act case. The "pass-on" defense is irrelevant to secondary line Robinson-Patman Act cases since the disfavored customer is injured even if he passes-on the higher charge.

VII. Prior To This Decision By The Fifth Circuit, Most Appellate Courts Did Not Preclude Use Of The Minimum Damage Rule.

Enterprise Industries v. Texas Co., 240 F.2d 457, 459-460 (2d Cir.) *cert. denied,* 353 U.S. 965 (1957), the leading case relied upon by both Chrysler and the Fifth Circuit, recognized that an inference of injury may be proved by price discrimination plus some "more" evidence. *Enterprise,* therefore, does not actually contradict *F.T.C. v. Morton Salt Co.,* 334 U.S. 37 (1948) or *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 757 (1947). When there are "extraordinary circumstances," the amount of price discrimination not the minimum amount of damages. When plaintiff failed to show anything except mere price discrimination in *Enterprise,* the court was merely recognizing that those "circumstances" were presented.

In applying the minimum damage rule, the Eighth Circuit in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*,[34] thoroughly analyzed and distinguished *Interstate Commerce Commission v. United States,* 289 U.S. 385 (1933), and other ICC cases. The Eighth Circuit held that failure to use the minimum (general) damage rule would weaken the statute. However, the minimum damage standard does not mean that, in every case, minimum damages are recoverable whenever there is a price discrimination. The Eighth Circuit in *Elizabeth Arden,* and later in *American Can Co. v. Russellville Canning Co.,* 191 F.2d 38, 55 (8th Cir. 1951),[35] recognized there would be instances where the minimum damages would not be recoverable.

Prior to the decision of the Fifth Circuit in this case, the majority of the appellate courts favored the minimum damage rule opposed by Chrysler.[36] Cases cited by Chrysler (Res. Br.

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[34]150 F.2d 988 (8th Cir. 1945). The Eighth Circuit analyzed the various ICC cases and concluded that under the Interstate Commerce Act, a plaintiff can only recover damages if it proves "special" damages to its business. However, a Robinson-Patman Act plaintiff need not prove "special damages." The nature of the Interstate Commerce Act prohibited recovery of anything except "special" damages because it was primarily aimed at prohibiting a carrier from rebating money to the shipper. The granting of a general damage award based on price discrimination alone would be, in effect, the same as authorizing a prohibited rebate, especially since all shippers are not in competition with one another. 150 F.2d at 995-996.

[35]*American Can Co. v. Russellville Can Co.,* 191 F.2d 38 (8th Cir. 1951), did not overrule *Elizabeth Arden* as claimed by Chrysler (Res. Br. 31-32). The Eighth Circuit was faced in *Russellville* with what *Bruce's Juices* referred to as "extraordinary circumstances." The *Russellville* court held that since the plaintiff and one of the favored purchasers were not in competition with each other, and since the freight equalization in question actually benefited plaintiff in its sales with respect to some of its competitors, then the amount of the discrimination would not be the proper measure of damages. The court recognized that, in the normal situation, damages would be the amount of the price discrimination, but found that this was not the normal situation. 191 F.2d at 55. It is generally accepted that *Russellville* did not overrule its decision in *Elizabeth Arden. See,* Comment, *Damages Under The Robinson-Patman Act,* 31 Md. L. Rev. 60, 76-77 (1971), containing an extensive discussion of the *Elizabeth Arden* and the *Russellville* decisions.

[36]The following appellate decisions support the minimum damage rule or only reject damages in the amount of the price discrimination when there are "extraordinary" circumstances:

28-29; n. 25) as following the *Enterprise* decision do not reject the reasoning in *Enterprise* that an *inference* of the fact of injury can be shown from price discrimination plus other supporting evidence. Those cases cited by Chrysler[37] which refer

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Supreme Court – *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 757 (1947).

Fifth Circuit – *American Can Co. v. Bruce's Juices*, 187 F.2d 919, 924 (5th Cir. 1951), *modified on other grounds, rehearing denied*, 190 F.2d 73, *cert. dismissed*, 342 U.S. 875 (1952).

Seventh Circuit – *Grace v. E. J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976).

Eighth Circuit – *Elizabeth Arden Sales Corp v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.) *cert. denied*, 326 U.S. 773 (1945). *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 55 (8th Cir. 1951). There was no evidence supporting the fact of actual damage, or from which the jury could have inferred the fact of actual damage, so this again is a case where the unusual circumstances mentioned in this Court's decision in *Bruce's Juices occur.* In fact, the Eighth Circuit did recognize that the normal situation would present a case where the price differential would be the minimum amount of damages. 191 F.2d at 55.

Zwicker v. J. I. Case Co., 596 F.2d 305 (8th Cir. 1979), does not reject the minimum damage rule as claimed by Chrysler in its Brief (Res. Br. 29 n. 25). In *Zwicker* the Court held that the damage allegedly resulting from the price discrimination was not supported by the evidence, and never discussed the general damage rule or any cases. *Baxter Imports, Inc. v. Saab-Scania of America, Inc.*, 1980-2 Trade Cases ¶ 63,367 (D. Minn. 1980), held that the rebates reducing the prices charged the competitors were equally available to all competitors, so there could be no damages.

Ninth Circuit – *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). This case is not overruled in any way by *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975), as Chrysler claims (Res. Br. 34-35). *Rutledge* merely cited general cases showing the need to prove injury without discussing the general or special damage rule. *Hasbrouck v. Texaco, Inc.*, 1980-2 Trade Cases ¶ 63343 (E.D. Wash. 1980), also cited by Chrysler, has been appealed to the Ninth Circuit.

[37]Res. Br. 28-29 n. 25. The Fifth Circuit did not reject the minimum damage rule until the instant case. In *McCaskill v. Texaco*, 351 F. Supp. 1332 (S.D. Ala. 1972), *aff'd, sub nom. Harrelson v. Texaco*, 486 F.2d 1400 (5th Cir. 1973), does not hold contrary to the Fifth Circuit's *American Can* case. In *McCaskill*, the District Court decided that the Robinson-Patman claim on a Motion for Summary Judgment in favor of defendant under the "meeting competition" defense. 351 F. Supp. at 1340. It then gratuitously expressed in *dictum* its opinion that the price differential in that case should not be the measure of damages. Since the Fifth Circuit affirmed without opinion under Local Rule 21, its affirmance of the District Court's opinion is without much precedential value.

to *Enterprise* reject only the theory that proof of injury can result from mere price discrimination alone.

VIII. Price Discrimination Injures The Economic Opportunities Of The Disfavored Purchaser.

The most important factor overlooked by Chrysler in its reliance on the *Enterprise* case and its progeny is that a business is usually injured in fact[38] in its competitive opportunities when its competitors have been able to buy the same merchandise at less cost. Even if the price discrimination is not reflected in the retail sales price, the normal result is to prohibit the disfavored purchaser from reducing its sales price, while keeping its same profit margin, and, hence, increasing its sales volume and profits. The fact that the favored customer did not reduce its sales price and perceptively take away customers from the disfavored purchaser ignores economic realities.

Commentators support the fact that, in the usual competitive market place, a disfavored purchaser is actually injured in the marketplace, regardless of whether or not that purchaser loses sales:

> Firms that fail to operate at lowest costs may temporarily break even or even make modest profits when demand is high, but will incur losses and eventually disappear when resources commanded by more efficient firms move into the market.[39]

Chrysler contends that under such an analysis, the more you sell, the more damages you incur. This is not true, certainly not in this case. Without the unjustifiably high quotas which

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[38]*State Wholesale Groceries v. Great Atlantic & Pacific Tea Co.*, 202 F. Supp. 768 (N.D. Ill. 1961), is a § 2 (d) case, and is almost identical to the instant situation since Payne did not receive as large a rebate as its competitors. The court held in *State Wholesale:*

> As a result of the violation, the nonfavored customer is left with less in its treasury—less in profits, less to carry on its business, less in reserve. The non-favored dealer has less money than he would otherwise have, and therefore, has been damaged.

[39]Areeda and Turner, *Antitrust Law*, Vol. 2, p. 270, ¶ 402 (b) (2) (1978).

Chrysler imposed on Payne, it would have suffered no price discrimination because it would have gotten an equal rebate per car sold. In the normal competitive market, the disfavored purchaser could not sell more and more cars and become more and more damaged. If the market were so inelastic and demand were so great that price did not affect the volume sold, then such facts may be the "extraordinary circumstances" in which the amount of the price discrimination may not be the amount of the damage. Under both the Fifth Circuit's reasoning and Chrysler's reasoning, Payne would have the burden of proving that these "extraordinary circumstances" did not exist, and then must also prove it lost sales and profits. Such a burden undermines the purpose of the Act.

IX. *Brunswick* Does Not Require This Court To Eliminate The Minimum Damage Rule.

Chrysler seeks to artificially narrow this Court's concept of antitrust injury in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *Brunswick* was a Section 7 Clayton Act case, not a Robinson-Patman Act case, and does not prohibit the use of the minimum damage rule in a Robinson-Patman Act case. The question presented in *Brunswick* was "whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying [plaintiffs] an anticipated increase in market shares." (*Id.* at 484). The Third Circuit had held that any loss "causally linked" to the "mere presence of the violator in the market" was compensable.[40] This Court held that only those mergers which may produce anti-competitive effects give rise to a cause of action for damages, reversing the Third Circuit because the purpose of the antitrust law was not to provide recovery for this situation.

In a Robinson-Patman Act secondary line case, the purpose of the Act is to maintain price equality so that every competitor

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[40]*NBO Industries Treadway Companies v. Brunswick Corp.*, 523 F.2d 262, 272-273 (3rd Cir. 1976).

is on an equal footing in the market. Different prices charged by a manufacturer to competing sellers defeat the very purpose of the Act. Therefore, in the instant case, recovery of damages for price discrimination and injury to Payne is exactly the purpose behind the Act.

X. Payne's Going Concern Value Was Reasonable And Supported By The Evidence.

There was evidence of Payne's going concern value based upon two methods: (1) appreciation of the "goodwill" value of the company, and (2) a capitalization of a stream of profits method.[41] This latter method is specifically approved by the Fifth Circuit. *Terrell v. Household Goods Carrier's Bureau,* 494 F.2d 16, 23, n. 12 (5th Cir. 1969); *Greene v. General Foods Corporation,* 517 F.2d 635 (5th Cir. 1975). Under the judge's charge, Payne could *not* recover for both future profits and going concern value (Tr. 807-808).

The Fifth Circuit's opinion in the instant case overlooks the broad discretion of a trial judge in admitting expert testimony on going concern value. The evidence on that issue is for the jury. *Terrell,* 494 F.2d at 24-25. In order to prohibit the use of minimum damage rule, the Fifth Circuit ignores previously well established case law, which would even permit evidence that "borders on the speculative" in order to estimate damages. *Hobart Brothers Company v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 904 (5th Cir. 1973). Previous decisions of this Court permit damages to be estimated by less than exact evidence.[42] Therefore, the jury verdict of $111,247.48 should stand.

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[41]Goodwill value alone was $50,000 to $75,000 (Tr. 75-76; 115-116). Dr. Ignatin's first method of determining going concern value was an appreciation of the "goodwill" value from 1955 until the company went out of business in 1974, at which time the going value was $100,000 (Tr. 207-209). Chrysler's own expert economist approved (Tr. 601-603) the second and preferred method used by Dr. Ignatin of capitalizing a stream of profits to determine the goodwill value as of May, 1974 to be $170,000. (Tr. 210-218; 279).

[42]*Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100 (1967); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962); *Bigelow v. RKO Radio Pictures Co.,* 327 U.S. 251 (1946).

CONCLUSION

For the foregoing reasons, the Fifth Circuit's opinion is inconsistent with Congressional intent and with the public policy inherent in enforcing the Robinson-Patman Act. This Court should therefore reverse the Fifth Circuit's opinion and reinstate the jury verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Lee Reeves, a member of the Bar of this Court, hereby certify that three (3) copies of Petitioner's Reply Brief on the Merits have been separately served upon J. Ross Forman, III, Attorney of Record for Respondent, at 1600 Bank for Savings Building, Birmingham, Alabama 35203, upon John T. Cusack, Attorney of Record for *amicus curiae,* Vanco Beverage, Inc. at One First National Plaza, Suite 3300, Chicago, Illonois 60603, upon Robert H. Whaley, Attorney of Record for *amicus curiae* Hasbrouck, at Fifth Floor, Spokane and Eastern Building, Spokane, Washington 99201, and upon Thomas Y. Davies, Attorney of Record for *amicus curiae,* Cessna Aircraft Company, 200 East Randolph Drive, Room 5800, Chicago, Illinois 60601, by depositing the same in the United States Mail, first-class postage prepaid, and properly addressed on January 13, 1981.

C. Lee Reeves